ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	CC Docket No. 94-11
	)	
TELEPHONE AND DATA SYSTEMS, INC.	)	File No. 10209-CL-P-715-B-88
	)	
For Facilities In The Domestic Public Cellular Telecommunications Radio Service on Frequency Block B, In Market 715, Wisconsin 8 (Vernon) Rural Service Area	)	

To: The Honorable Joseph P. Gonzalez
Administrative Law Judge

OPPOSITION TO MOTION TO ENLARGE ISSUES

MULLIN, RHYNE, EMMONS AND TOPEL, P.C.

Nathaniel F. Emmons
Andrew H. Weissman
1225 Connecticut Ave., NW
Suite 300
Washington, DC 20036-2604

SIDLEY & AUSTIN

R. Clarke Wadlow
Mark D. Schneider
Thomas P. Van Wazer
1722 Eye Street, NW
Washington, DC 20006

KOTEEN & NAFTALIN

Herbert D. Miller
1150 Connecticut Ave., NW
Washington, DC 20036

ATTORNEYS FOR TELEPHONE AND DATA SYSTEMS, INC.

ATTORNEYS FOR UNITED STATES CELLULAR CORPORATION, INC.

August 25, 1994

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Telephone and Data Systems, Inc. ("TDS") and United States Cellular Corporation ("USCC"), by their attorneys, hereby oppose the Motion To Enlarge Issues (the "Motion") filed by Century Cellunet, Inc., et al. (the "Settlement Group"), on July 22, 1994. In opposition, TDS and USCC state as follows:

I. Introduction and Summary.

The Settlement Group argues that several editions of TDS telephone directories furnish information about UTELCO and are therefore evidence that TDS controls UTELCO. The Settlement Group, effectively ignoring its own past pleadings and the decision of the Commission in this case, contends that this "new evidence" raises a substantial and material question of fact as

to whether TDS made misrepresentations in responding to assertions made by the Settlement Group concerning the lottery proceeding for the Wisconsin 8 RSA authorization.

The Settlement Group's contentions are erroneous. In responding to the Settlement Group's assertions that TDS had violated Sections 22.921(b) and 1.65 of the FCC's rules, TDS did not make factual representations concerning the control of UTELCO, by affidavit of a principal or otherwise. Indeed, the Settlement Group's current contention starkly contradicts its prior assertion that "TDS has never made any claim in this proceeding, much less established such claim in its papers" that TDS was not in control of UTELCO. See Application For Review, filed February 15, 1991, at 8 (emphasis in original). In fact, the Settlement Group has asserted that what TDS "did say in this regard is that 'since UTELCO did not file an application, its relationship to TDS is not properly before the FCC.'" Id. The Settlement Group thus has argued vigorously in the past that the absence of any TDS disclaimer concerning control of UTELCO was "conspicuous," and that TDS thereby implicitly acknowledged that it was in control of UTELCO. See Reply To Opposition To Application For Review, filed April 4, 1991, at 2-3. Because the Settlement Group itself has asserted that TDS "never made" the claim that the Settlement Group now says was not candid, the requested issue should not be added.[1]

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[1] TDS and USCC continue to maintain that control of UTELCO is not material to the issues that were before the Commission.

The Motion simply is an indirect but nevertheless improper request that the Presiding Judge reconsider the Commission's designation order in this case, which found that TDS had not violated Section 22.921 of the FCC's rules. In the HDO, the Commission did not discuss the question of control of UTELCO despite the Settlement Group's numerous factual contentions concerning control of UTELCO. TDS did not respond to these contentions because it believed them to be irrelevant. The Commission resolved the matter on grounds advocated by TDS that were unrelated to the control of UTELCO: it held that TDS's interest in UTELCO and UTELCO's participation in the settlement agreement did not violate Section 22.921(b) of the Commission's rules and implicitly found that control of UTELCO was not germane to that issue.

Moreover, as is demonstrated below, the telephone directories published by TDS do not add anything substantial or material concerning whether TDS controls, or does not control, UTELCO. The directories do not purport to be a source of information on the relationship between listed companies, much less their control. During the period cited by the Settlement Group, TDS held between 25% and 50% of the voting stock of only two operating companies and both, including UTELCO, were listed in the telephone directories. However, unlike those telephone companies in Wisconsin controlled by TDS, UTELCO was not listed as one of the "Wisconsin Region Operating Companies" in the directories. Because the Settlement Group's sole basis for

seeking to enlarge the issues is the inclusion of UTELCO in the TDS telephone directories, no substantial or material fact has been shown warranting the addition of an issue.

II. The Background Of This Proceeding.

In September 1988, TDS filed an application for the Wisconsin RSA 8 wireline cellular authorization, relying on its ownership of Mt. Vernon Telephone Company, in Verona, Wisconsin, as the basis for its wireline qualifications. TDS also had, and still has, an indirect interest in another operating telephone company with a wireline presence in that market, United Telequipment Corporation, later renamed UTELCO. UTELCO did not file a cellular application and, by virtue of the application filed by TDS, could not have done so without causing a violation of Section 22.921(b) of the FCC's rules. Section 22.921(b) provides in relevant part that:

> No party to a wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, except that interests of less than one percent will not be considered.

47 C.F.R. § 22.921(b). TDS has always acknowledged that its interest in UTELCO was sufficiently substantial so that UTELCO could not have filed its own Wisconsin 8 application without causing a violation of Section 22.921. TDS's position throughout has been that because UTELCO did not file an application, TDS did

not have a cognizable interest in any Wisconsin 8 application (except its own) within the meaning of Section 22.921.

Before the Wisconsin 8 lottery was held, UTELCO, along with several other local exchange carriers in the RSA which had not filed applications, was invited to join, and did join, the Settlement Group. TDS did not join any settlement group. When TDS won the lottery, Century Cellunet, Inc. ("Century") filed a Petition To Dismiss Or Deny TDS's application (the "Petition").[2] Century claimed that TDS's winning application had been vitiated by the entry of UTELCO into the Settlement Group, because that gave UTELCO, and therefore TDS, a prohibited cross-interest in all of the applications filed by the various applicants which became members of the Settlement Group. Century's argument was based on undisputed facts concerning TDS's interest: among other things, UTELCO was "49% owned by TDS" and TDS had "an option to purchase the remaining 51 percent." Petition at 4 & n.*.[3]

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[2] For ease of convenience, TDS and USCC have served simultaneously herewith an Appendix containing the substantive pleadings and orders discussed in the instant Opposition.

[3] Century's sources for this information were FCC Forms 430 and 490 which had been filed with the Commission by counsel for UTELCO, who were also counsel for Century, although not in this proceeding. Those FCC forms showed that TDS owned 49 percent of the voting stock of UTELCO.

In its original Petition, Century did not make any argument based on a claim that TDS controlled UTELCO.[4] TDS's response similarly took no position as to whether TDS did or did not control UTELCO. TDS instead argued that the entry by non-applicant UTELCO into the settlement agreement did not create a prohibited cross-interest because the Commission had held that entry into wireline settlement agreements did not create prohibited cross-interests even among applicants who filed applications. TDS also argued that because the settlement agreement to which UTELCO was a party imposed neither duties nor obligations on TDS, and in no other respect changed the information already included in TDS's application, TDS had no obligation to report the existence of the settlement agreement under Section 1.65 of the Rules. See Reply To Petition at 11.[5]

The Mobile Services Division ("MSD") substantially agreed with TDS's analysis. After quoting the relevant part of Section 22.921(b) of the FCC's rules, the MSD held that:

> TDS does not hold ownership interests in more than one application for the Wisconsin 8 RSA, and therefore, we find that no violation of Section 22.921(b) of the Rules has occurred.

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[4] Century argued that TDS's application was subject to dismissal because "TDS has a prohibited cross-ownership in more than one application in the Wisconsin 8 - Vernon Rural Service Area in violation of Section 22.921(b) of the rules, and because TDS failed to timely disclose such prohibited cross-ownership as required by Section 1.65 of the rules." See Petition at 2.

[5] TDS, both in its initial application and its Section 1.65 amendment, had reported that it had an interest in UTELCO in its listing of affiliated companies.

Telephone and Data Systems, Inc., 4 FCC Rcd. 8021 (MSD 1989) ("MSD Order") ¶¶ 6-7.[6] The MSD also concluded that TDS did not violate Section 1.65:

> in the case before us, TDS was not a party to the settlement agreement and UTELCO was not an applicant. In these circumstances, TDS was not obliged to report the existence of the Wisconsin 8 Settlement Agreement.

MSD Order, ¶ 8. The MSD's opinion, like the pleadings filing by the parties, did not consider whether TDS was or was not in control of UTELCO.

The Settlement Group sought, and TDS opposed, reconsideration of the MSD's decision. Neither party raised any question of whether TDS was or was not in control of UTELCO. The Common Carrier Bureau ("CCB") affirmed the MSD's decision, but on a different theory than had been argued by TDS and adopted by the MSD. That theory for the first time presumed that TDS was not in control of UTELCO. The CCB held that UTELCO's entry into the

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[6] In arriving at its conclusion, the MSD stated that:

> TDS does not have any interest in the applications filed by the other wireline applicants. . . . The wireline applicants did not agree to give the members of the Wisconsin RSA Settlement Agreement an interest in their own applications. Instead, the agreement contained a provision providing that in the event that one of the wireline applicants won the lottery, that wireline applicant would substitute the Wisconsin 8 Partnership as the winning applicant. Since none of the settling applicants won the lottery, the contingent clause never became effective and, thus, no substituted application was ever filed including UTELCO (and, thus, TDS) as a minority partner.

MSD Order, ¶ 8.

settlement agreement had caused a violation of Section 22.921(b) not only by TDS, but also by all applicants who were parties to the settlement agreement. Telephone and Data Systems, Inc., 6 FCC Rcd. 270 (1991) ("CCB Order"), ¶ 7. The CCB stated:

> First, at the time it filed its application, TDS was in compliance with the Commission's Rules. After filing, Century Group formed a partial settlement group which included wireline carriers, such as UTELCO, who had not originally filed applications in the Vernon market. Century Group knew of TDS' ownership interest in UTELCO and, despite this knowledge, permitted UTELCO to join the settlement group. In these circumstances, it appears to be UTELCO's and Century Group's actions which led to the violation of Section 22.921(b) of the Rules and not TDS's actions. Short of withdrawing its own application, TDS could do nothing more than object to UTELCO's entry into the partial settlement group. . . . Second, even if Century Group's theory were correct, a more appropriate sanction than dismissing only TDS's application would be to dismiss all Century Group applications and TDS's application since all of the these [sic] applications suffered from the rule violation. This action would be inequitable to TDS because it was not within TDS's control to prohibit UTELCO from joining the settlement group.

CCB Order, ¶¶ 7-8. The CCB also held that TDS had not violated Section 1.65 of the Rules, but relied on a different theory than had the Mobile Services Division. The CCB held:

> TDS is not the controlling party in UTELCO which entered into the settlement agreement, and UTELCO was not an applicant in the Vernon RSA market. Particularly because the settlement agreement did not become effective when TDS won the lottery, TDS had no obligation to inform the Commission of the settlement.

CCB Order, ¶ 10 (emphasis added).

TDS, which had never addressed whether it controlled UTELCO because it viewed that issue as irrelevant, filed a

Contingent Application For Review seeking to have the issue decided on the legal grounds TDS had consistently advocated in its prior pleadings. The Settlement Group also filed an Application For Review, noting that "[p]erhaps the core errors permeating the decision in the Recon. Order are the wholly unsupported assumptions" relating to TDS's lack of control over UTELCO, including that "TDS is not the controlling party in UTELCO." Application for Review, at 7. The Settlement Group added:

> TDS has never made any claim in this proceeding, much less established such claim in its papers, similar to these findings in the Recon. Order. In fact, what it did say in this regard is that 'since UTELCO did not file an application, its relationship to TDS is not properly before the FCC.' Opposition to Petition for Reconsideration, dated December 29, 1989, p. 9 and n. 3 (emphasis added). Thus, in making these findings, the Recon Order simply embarked on a fantasy with no basis whatsoever in the record. . . . Moreover, the normal inference from the fact that one entity holds 49% of the stock of a company, with the balance spread among a number of individuals with less than 10% each, is that the entity with 49% wields effective control. In short, absent any undisputed countervailing evidence in the record, and there is none, the foregoing Recon. Order's findings are contrary to and totally undermined by UTELCO's status for regulatory purposes as a subsidiary of TDS.

Application for Review, at 8 - 9 (footnotes omitted).[7]

In its opposition to the Settlement Group's Application For Review, TDS again urged the Commission to decide the case on the same rationale adopted by the MSD, which, as noted above, had

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[7] In a footnote, the Settlement Group offered to put in additional evidence concerning the relationship of TDS to UTELCO. Application for Review at 9.

nothing to do with the question of control. TDS did not dispute **any** of the Settlement Group's control contentions, as the Settlement Group itself stressed in its reply pleading:

> In tacit recognition of the obvious correctness of the Settling Partner's analysis, TDS in its opposition papers makes no more than a token effort to defend the Recon. Order's factual findings. In this regard, TDS merely advances a truly mysterious claim that the Settling Partners could have remedied any unfairness in TDS' conduct by simply excluding UTELCO from the settlement group at the time the group was substituted for the winning lottery applicant. See TDS Opposition at pp. 3 - 4.
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> ***
>
> Apart from that limited exercise, TDS devotes its opposition papers to attempting to convince the Commission that it should not affirm the Recon. Order's findings that a violation of Section 22.921(b) of the rules occurred when TDS maintained a separate and independent application for the Wisconsin 8 wireline cellular authorization, while its subsidiary UTELCO joined the settlement group which was attempting to achieve a full market settlement in Wisconsin 8. Conspicuous by its absence is any attempt whatsoever to refute the Settling Partners' specific showing in their application for review that the Recon. Order's analysis of the equities in this case is wholly unsupported by, and contrary to, the record in this case. Accordingly, for purposes of the review proceedings, the Settling Partners' refutation of the Recon. Order must be accepted as uncontested.

Reply to Opposition to Application for Review, at 2 - 3.

In the Hearing Designation Order, faced with the Settlement Group's unrebutted challenge to the CCB's statement that TDS lacked control over UTELCO, the Commission did not discuss the matter in making its findings. Instead, it substantially adopted the MSD's rationale under which control was

irrelevant and reversed the Bureau's finding that there had been a violation of Section 22.921(b):

> [W]e interpret Section 22.921(b) as not covering contingent interests created by settlement agreements among mutually exclusive wireline applicants. Likewise, Section 22.921(b) does not cover contingent interests created by settlement agreements among wireline applicants and non-applicants. . . . Therefore, the Bureau's conclusion that TDS' application should not be dismissed is affirmed, albeit on different grounds.

Telephone and Data Systems, Inc., 9 FCC Rcd. 938 (1994), ("HDO"), ¶ 12 (emphasis added).

III. TDS Made No Claims As To Control Of UTELCO.

The Settlement Group's interpretation of TDS's position was entirely correct when it asserted in its Application for Review that "TDS has never made any claim" that it did not control UTELCO, but that TDS claimed instead that because UTELCO did not file an application, "its relationship to TDS is not properly before the FCC." See supra at 9. Moreover, as the Settlement Group stressed to the Commission in its subsequent reply, TDS did not dispute that interpretation when opposing the Settlement Group's application for review. See supra at 10-11. The Settlement Group therefore is completely disingenuous when, by suggesting in its Motion that TDS attempted to mislead the Commission into accepting the thesis that TDS did not control UTELCO, it now advances a different interpretation of TDS's position. See Motion at 4.

Control of UTELCO simply was not at issue, as reflected in the Commission's decision in the HDO. See supra at 11.[8] Because control of UTELCO was not relevant to the issue, counsel for TDS did not challenge the Settlement Group's factual contentions concerning control, but successfully advocated an interpretation of Section 22.921(b) to which the control question was not relevant. See Declaration of Alan Y. Naftalin, attachment 1.[9]

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[8] In summarizing the history of the proceeding, the Commission recited the control theory on which the order on reconsideration had been based, and then observed that "[a]dditionally, the Bureau agreed with the MSD that TDS did not violate Section 1.65 because it was not a controlling party in UTELCO and UTELCO was not an applicant in the market." HDO ¶ 5. In a footnote to the HDO, the Commission stated that "[a]lthough the settling partners do not continue to directly argue that TDS violated Section 1.65, we affirm the Bureau on its finding that no Section 1.65 violation occurred." HDO, ¶ 5, n.5. Contrary to the impression which the Settlement Group attempts to create by truncating the Commission's language quoted above on page 7, n.7 of their Motion, the Commission no more adopted the Bureau's rationale in affirming the conclusion that there had been no Section 1.65 violation than the Bureau had adopted the MSD's rationale which had said nothing about control. See supra at 7. Contrary to the assertion of The Settlement Group, the Commission did **not** rely on "the alleged 'minority owner' status of TDS in UTELCO." Motion, at 7-8. The CCB had held that "particularly because the settlement agreement did not become effective when TDS won the lottery, TDS had no obligation to inform the Commission of the settlement." See supra at 8.

[9] Indeed, any TDS ownership interest in UTELCO of 14.2 percent or greater, under the Settlement Group's theory, would have put TDS in violation of Section 22.291(b) by giving TDS a greater than one percent interest in the applications of the settlement group members, see Petition, at 4-5, or in the Settlement Group's 'joint enterprise,' Petition for Reconsideration, at 9. According to Century, each settlement group participant had a 7.143% interest. On Century's theory, that figure, multiplied by the 49% percent interest in UTELCO attributed to TDS by Century, meant that TDS had a 3.5 percent interest in each application in (continued...)

Despite its previous contention that TDS had made no claims concerning control of UTELCO, the Settlement Group now claims the contrary by citing out of context several references in TDS's pleadings to its "minority interest" in UTELCO. In context, however, those recitations did not address control and were intended to recite the nature of TDS's interest in UTELCO reflected in UTELCO's FCC Form 430. In TDS's view, control of UTELCO was not relevant, and to have attempted any analysis of the factual indicia of control and of their legal implications would have been unnecessarily complicated and time consuming, straying from the only real issue, the proper interpretation of Section 22.921(b). That is why, in response to the only Settlement Group contentions concerning control of UTELCO, TDS took no position on the subject. See Declaration of Alan Y. Naftalin.[10]

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[9] (...continued)
the Settlement Group. A TDS interest of only 14.2 percent in UTELCO would, on Century's theory, have given TDS an interest of 1.01 percent in each such application. This, according to the Century Petition for Reconsideration, was the "core of the violation." Id. at 9. "Control" of UTELCO had nothing to do with it.

[10] It must be noted that TDS submitted no statements of its principals in its pleadings, and that the Settlement Group's attack on TDS's candor is based solely on its contentions concerning TDS's pleadings drafted by counsel. Although counsel for TDS took no position on the control of UTELCO, counsel relied on filings by UTELCO at the FCC. In 1988, when TDS's application was filed, TDS owned 9,800 shares (49%) of the voting stock of Monroe Communications Corporation ("Monroe") and Monroe owned all of the stock of UTELCO. TDS had an option to buy the remaining 51% of the Monroe voting stock. These facts were of public record at the time TDS filed its application, and were contained in the FCC Form 430 filed by UTELCO in 1988, which was attached to Century's Petition. Actually, the 51% of Monroe's voting
(continued...)

Although the Settlement Group now argues that the Bureau's control findings "were the basis for much of the debate before the Commission," Motion at 6, that contention is totally misleading. The only debate on that subject was by the Settlement Group with the Bureau's findings. TDS did not dispute the Settlement Group's factual contentions, as the Settlement Group itself, up until now, has stressed to the Commission. See supra at 9-11.[11]

It is of course true that applicants have a "special duty of candor and forthrightness," and that they have "an

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[10] (...continued)
stock not owned by TDS has been held in a voting trust since 1986, the trustee of which is Merlin Haugesteun, a long time Wisconsin telephone executive. Mr. Haugesteun has been unaffiliated with TDS since 1976, some eight years prior to his becoming the voting trustee. Although the beneficial owners of most of the stock held in the voting trust (nineteen shareholders each holding 2.25% of Monroe's voting stock) are current or former employees of TDS or its affiliates, Charles D. Metcalfe, who beneficially owns the remaining 2.55% of Monroe's voting shares in the voting trust and is otherwise unaffiliated with TDS, currently serves as the General Manager and President of UTELCO and has served as General Manager of UTELCO since 1982, some four years before Monroe acquired UTELCO. According to the terms of an agreement with the Rural Electrification Administration ("REA") which pre-dates TDS's investment in UTELCO, UTELCO may not remove Mr. Metcalfe as General Manager without the REA's approval. Additionally, in 1988, when TDS filed its Wisconsin 8 application, TDS also held 10,327 shares of Monroe's non-voting, non-convertible, preferred stock, as to which there was no Form 430 or other reporting requirement.

[11] The Settlement Group argues that TDS was content to allow the Commission to rely on the findings in the reconsideration order that TDS was not in control of UTELCO. Motion at 7. That is false. TDS's Contingent Application For Review expressly asked the Commission **not** to rely on the erroneous theory based on those irrelevant findings and instead to rely on the analysis provided in the MSD's decision, to which the control question was irrelevant. That is what the Commission did.

affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." Motion at 8. TDS did exactly that, and was under no obligation to raise the issue of control of UTELCO, to take a position on the control of UTELCO, or to join in a dispute with the Settlement Group on that issue -- an issue that TDS, the MSD and later the Commission all viewed as irrelevant.[12]

IV. The Directories Have No Relationship To Control of UTELCO.

Moreover, the TDS telephone directories raise no substantial or material question concerning the control of UTELCO. The directories are, in fact, much less significant than the facts previously advanced by the Settlement Group to the Commission, not countered by TDS, and rejected as irrelevant by the Commission. TDS has published directories for many years to provide a convenient unified source of information when individuals associated with TDS or its affiliates need to communicate. That is their only purpose. They do not purport to be a reliable source of information on ownership, control, or even the nature of relationships between listed companies. While

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[12] Finally, the TDS pleadings which the Settlement Group addresses in its Motion to Enlarge Issue were written by counsel, who made all of the decisions about what to include. As stated in the attached declaration of Alan Y. Naftalin, "in fulfillment of my responsibilities as counsel to TDS in this matter, I was responsible for all of the tactical decisions and legal judgments reflected in those pleadings, including all decisions about what to argue and how." Counsel's tactical decisions and legal judgments were proper and reasonable, and TDS was entirely justified in relying on them.

the directories list "TDS Companies" and "TDS Operating Telephone Companies," they neither define those terms nor even suggest whether the companies so listed are wholly or partially owned or controlled by TDS.

The UTELCO listings in the directories excerpted in attachments to the Motion are not meaningful for purposes of analyzing control of UTELCO. In 1990, TDS held between 25% and 50% of the voting stock of only two telephone operating companies: UTELCO (49%) and Volcano Telephone Company ("Volcano") (48.83%).[13] Both of those companies appear in the 1990 directory and both are listed as "TDS Operating Telephone Companies." UTELCO appears at pages 9, 12, 17, 85-86, and 187-188.[14] However, UTELCO, unlike other TDS operating telephone

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[13] The listing of Volcano in the TDS telephone directory constitutes solid evidence that such directory listings do not bear on control. As is described in various FCC proceedings, TDS, a minority stockholder in Volcano, engaged in a long legal battle in the California state courts in an effort to obtain control of Volcano. TDS and another party thus both filed applications asking FCC consent to acquire control of Volcano. See, e.g., File Numbers 21481-CD-TC-01-90; 13222-CF-TC-5-90. The FCC granted both parties the right to acquire control of Volcano on the condition that neither party would exercise control over Volcano until their respective rights were resolved by the California courts. In 1993, the other party prevailed in the state court litigation and subsequently assumed control of Volcano. At no time in those protracted proceedings did TDS or anyone else ever assert that TDS controlled Volcano. A listing in the TDS telephone directory therefore clearly does not mean that TDS controls the referenced company.

[14] The directories also list, under "TDS Officers and Directors," the officers and directors of various TDS subsidiaries and affiliates. The directories neither define those terms nor even suggest that the individuals so listed are officers and directors of TDS as the Settlement Group contends. The 1990 directory (continued...)

companies located in Wisconsin, is not listed as one of the "Wisconsin Region Operating Companies" at pages 41-42 of the 1990 directory. As documents produced in this proceeding demonstrate, Volcano appears at pages 87-89 and 188. At some time between 1990 and 1994, TDS deleted information in its directories for companies in which TDS held a minority voting position and the references to UTELCO and Volcano were dropped from the directories. See, e.g., 1994 TDS Directory, Bates No. TDS2445-TDS2738.

According to the Settlement Group, the TDS telephone directories "unambiguously portray UTELCO, Inc. from 1987 through 1990 essentially as just another TDS subsidiary telephone company. Stated another way, they portray UTELCO, Inc. in substance as a company under TDS' dominion and control." Motion at 4. The Settlement Group simply is wrong in asserting that TDS directories have anything to do with "dominion and control" over UTELCO. As is demonstrated above, the telephone books simply provided useful telephone numbers; it was not unreasonable to maintain telephone numbers for key personnel at a company in which TDS owned a significant voting (49%) interest. To the

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[14] (...continued)
lists 700 directors of 80 companies at pages 147 to 191. Even a cursory review of the UTELCO listing at pages 187 to 188 would reveal that not one of UTELCO's eight directors is a director of TDS listed at pages 184 to 185, although some are TDS employees as reflected by the 1988 FCC Form 430 attached to Century's Petition, which gives their addresses as 301 S. Westfield Road, Box 5158, Madison, Wisconsin 53705.

extent UTELCO was included in the directory, it was not "unambiguously" portrayed as "just another TDS subsidiary telephone company," having been excluded from the list of "Wisconsin Region Operating Companies."

Moreover, the directories supplied by the Settlement Group provide much less substantial and material evidence than already has been placed before, and determined immaterial by, the Commission. TDS itself included UTELCO in its listing of more than one hundred "Subsidiaries of Applicant With Interests in Paging and Other Radio Facilities and Affiliates of Applicant with Interests in Cellular Facilities" in TDS's 1988 application for the Wisconsin RSA 8 cellular authorization. TDS acknowledged public filings at the FCC by UTELCO which report that TDS has a 49% voting interest in UTELCO and an option to acquire the remaining 51% voting interest. TDS did not challenge any of the factual assertions by the Settlement Group in the past. Nevertheless, despite the Commission's refusal to raise an irrelevant "control" issue on this record, the Settlement Group effectively asks the Presiding Judge to reconsider the HDO based on nothing more than TDS's telephone books. Plainly the Settlement Group has raised no substantial and material question of fact warranting the addition of a new issue in this proceeding.

Conclusion

The HDO laid to rest any claim that the locus of control of UTELCO was relevant to whether TDS had a prohibited cross-interest with the other Wisconsin RSA 8 applicants or whether TDS violated Section 1.65 of the Rules. Under the law of this case, as articulated in the HDO, control of UTELCO simply is 2not relevant, as TDS has consistently maintained. The Motion is a thinly disguised effort to have the Presiding Judge overrule the Commission's construction of Section 22.921(b) by finding the locus of control of UTELCO relevant. TDS made no effort to deceive the Commission, and did not do so, when it refused to debate the Settlement Group on the irrelevant subject of UTELCO's control. The TDS directories cited by the Settlement Group are not evidence to the contrary.

FOR THE FOREGOING REASONS, the Motion to Enlarge Issues should BE DENIED.

Respectfully submitted,

TELEPHONE AND DATA SYSTEMS, INC.

By: Nathaniel F. Emmons (by MDS)
Nathaniel F. Emmons
Andrew H. Weissman

Mullin, Rhyne, Emmons and Topel, P.C.
1225 Connecticut Ave., - Suite 300
Washington, D.C. 20036-2604
(202) 659-4700

By: H. Dan Miller (by MDS)
Herbert D. Miller

Koteen & Naftalin
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 467-5700

UNITED STATES CELLULAR CORPORATION

By: Mark D. Schneider
R. Clark Wadlow
Mark D. Schneider

Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

By: H. Dan Miller (by MDS)
Herbert D. Miller

Koteen & Naftalin
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 467-5700

August 25, 1994

ATTACHMENT 1

DECLARATION OF ALAN Y. NAFTALIN

1. I, Alan Y. Naftalin, under the penalty of perjury, do hereby declare that the following declaration is true and correct to the best of my knowledge, information and belief.

2. I am a senior partner with the law firm of Koteen & Naftalin. At all times during the filing of pleadings concerning the award of an authorization to construct and operate a wireline cellular system in the Wisconsin 8 RSA (the "Wisconsin 8 litigation"), I and my firm have represented Telephone and Data Systems, Inc. ("TDS"). As part of our representation of TDS in the Wisconsin 8 litigation, I was responsible for reviewing, revising and approving drafts of all pleadings filed to respond to the allegations (the "Section 22.921 allegations") made by Century Cellunet, Inc and its successor in interest, the "Settlement Group" ("the Settlement Group") that TDS had violated Section 22.921 of the Commission's rules because UTELCO, Inc. ("UTELCO"), a non-applicant for the Wisconsin 8 construction permit, had entered into a settlement agreement with the Settlement Group. In fulfillment of my responsibilities as counsel to TDS in this matter, I was responsible for all of the tactical decisions and legal judgments reflected in those pleadings, including all decisions about what to argue and how.

3. The Petition filed by Century on July 27, 1989, and the later pleadings filed by the Settlement Group, alleged that TDS had an ownership interest in UTELCO sufficient to give TDS a greater than one percent cross-interest in the applications filed by each of the other members of the settlement group, in violation of Section 22.921 of the Commission's Rules. Under the theory which they advanced, any TDS interest in UTELCO of greater than 14 percent would have given TDS a prohibited cross interest. Since TDS had a much greater interest than 14 percent in UTELCO, Commission adoption of the Settlement Group theory would, in my view, probably have led to the dismissal of TDS's Wisconsin 8 application. The Settlement Group also argued that TDS had proceeded unfairly and unethically by presenting itself and UTELCO as a "package," by initially

promising to join the Settlement Group along with UTELCO, and then not doing so at the last minute after UTELCO had been admitted.

4. In my view, the Settlement Group pleadings sought to persuade the Commission to misconstrue Section 22.921 of the Rules on the basis of "equitable" and coloration arguments grounded in TDS's alleged dealing with the Settlement Group. Rather than react to this approach by debating with the Settlement Group over these matters, I decided that it would be in TDS's best interests to try to focus the debate narrowly on what I considered the proper legal construction of Section 22.921, which was contrary to that advocated by the Settlement Group. To that end, we disputed the significance of those allegations and arguments as a legal matter, but offered no counter allegations. The Mobile Services Division agreed with our interpretation of Section 22.921 and held that there had been no violation. On reconsideration, the Common Carrier Bureau essentially agreed with the Settlement Group interpretation of Section 22.921 but held that although Section 22.921 had been violated, TDS's application need not be dismissed, in part because it found that TDS did not control UTELCO. Because we considered the Bureau's ground for decision to be erroneous, we filed a contingent application for review.

5. In their pleadings filed with the Mobile Services Division and the Common Carrier Bureau, the Settlement Group had not raised any issues about control of UTELCO, and neither had we. Later, when the Settlement Group sought Commission review of the Common Carrier Bureau's decision on the ground that its finding that TDS was not in control of UTELCO was unsupported by the record and wrong, we again took the position that under a correct interpretation of Section 22.921, there had been no violation. We did not respond at all to the Settlement Group's contentions that TDS was in *de facto* control of UTELCO by virtue of its ownership of 49 percent of the voting stock, its option to acquire the remaining 51 percent, and other presentations. Just as we had previously sought to focus the debate on the legal question of how Section 22.921 must be construed by not debating the facts we considered irrelevant, in the TDS contingent application for review and in its opposition to the Settlement Group application for review, we urged the